IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

D. R. SHERRY CONSTRUCTION, LTD.,	)	
	)	
Respondent,	)	WD69631
	)	
vs.	)	Opinion Filed:
	)	August 4, 2009
	)	
AMERICAN FAMILY MUTUAL INSURANCE COMPANY,	)	
	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF PLATTE COUNTY, MISSOURI
The Honorable Owens Lee Hull, Jr., Judge

Before Division II: Victor C. Howard, Presiding Judge, Joseph M. Ellis, Judge, and Mark D. Pfeiffer, Judge

American Family Mutual Insurance Company (American Family) appeals the trial court's judgment for D. R. Sherry Construction, LTD. (Sherry) on Sherry's breach of contract claim and vexatious refusal to pay claim. On appeal, American Family presents five points. Because we find its second point dispositive, we address that point alone and reverse the trial court's judgment for Sherry.

In March 2003, Sherry, a general contracting company, started construction on a house at 13395 Sycamore Drive in Platte County. At that time, Sherry was insured by American Family under a general liability insurance policy. In July 2003, Sherry finished construction of the house. On August 8, 2003, Sherry's president and sole shareholder, Darrin Sherry, completed a

walk-through of the house with the future homeowners and found no evidence of any structural damage to the house at that time. The homeowners expressed satisfaction with the house and closed on the purchase of the house on August 15, 2003. Sherry received no further communications from the homeowners between August 15, 2003, and April 2004.

In April 2004, the homeowners notified Darrin Sherry that there were some problems with the house. Darrin Sherry went to the house and the homeowners showed him some cracks in the foundation and drywall. Darrin Sherry sent an employee to the house to patch the cracks and Darrin Sherry told the homeowners to let him know if there were any further problems. Sherry did not hear from the homeowners again until he received a letter from them in July 2004. In the letter, the homeowners notified him that there were numerous re-appearing and new cracks in the foundation of the house. The letter notified Sherry that the homeowners had hired a professional engineer to inspect the house and that he determined that the structural problems with the house were happening because the house was out of level by as much as 8 inches. The letter led Darrin Sherry to conclude in July 2004, that "the house is moving. Something is not right." Sherry's investigation into the cause of the damage at the house led Sherry to conclude that repeated exposure of the foundation of the house to poor soil conditions caused stress on the foundation, which ultimately led to a damaged foundation evidenced by cracks in the foundation, cracks in the sheetrock, and the out-of-level condition of the house as expressed by the engineer hired by the homeowners. Eventually, the homeowners threatened to sue Sherry over the damage to the house and they demanded that the company repurchase the house. In March 2005, Sherry entered into an agreement with the homeowners to repurchase the house for approximately $265,000.

In November 2005, Sherry filed suit against American Family asserting a breach of contract claim and a vexatious refusal to pay claim. Sherry's case proceeded to a jury trial in

January 2008. At trial, the parties disputed the date that American Family's insurance policy ended. American Family contended that Sherry cancelled the policy in September 2003, while Sherry maintained that it ended on December 5, 2003. Sherry called Darrin Sherry to the stand who testified that, after the closing on the sale of the house in August 2003, the homeowners did not contact Sherry again until April 2004, when the homeowners first complained about the cracks in the house's foundation. Specifically, Darrin Sherry testified as follows:

> Q: Now, your company built this house in 2003, from March to August 2003, Right?
>
> A: That is correct.
>
> Q: They [the homeowners] complained starting eight months later in April of 2004.
>
> A: Correct.
>
> Q: It's the first time you had a complaint from [the homeowners] about the house?
>
> A: That I can recall and that I have record of, yes, sir.

At the close of all the evidence, American Family filed a motion for a directed verdict on the basis that there was no evidence that the house sustained any property damage during the effective policy dates of the insurance policy. The trial court overruled the motion and submitted the case to the jury. The jury returned a verdict in favor of Sherry, and the trial court entered judgment for Sherry. This appeal follows.

In the dispositive point on appeal, American Family claims that the trial court erred in overruling its motion for directed verdict at the close of all the evidence, because Sherry failed to present evidence to support each element of its breach of contract claim. Specifically, American Family claims that Sherry failed to present evidence that the property damage occurred during the policy period. We agree.

Unless the plaintiff makes a submissible case, the trial court cannot submit his case to the jury. *Townsend v. E. Chem. Waste Sys.*, 234 S.W.3d 452, 464 (Mo. App. 2007). To make a submissible case, the plaintiff must present evidence from which the jury could have a reasonable basis for finding each element of the plaintiff's claim. *Id.* In reviewing whether or not the plaintiff made a submissible case, we view the evidence in a light most favorable to the plaintiff and give him the benefit of all reasonable inferences. *Id.* We also are required to disregard all contrary evidence and inferences. *Id.* We, however, cannot supply missing evidence or give the plaintiff the "'benefit of speculative, unreasonable, or forced inferences.'" *Id.* (citation omitted). Whether or not the plaintiff made a submissible case is a question of law, which we review *de novo*. *Id*.

In its petition, Sherry filed a breach of contract claim against American Family on the basis that American Family breached its insurance contract with Sherry when it failed to provide insurance coverage to Sherry for the damages sustained by Sherry as a result of the damage caused to the Sherry constructed house by unanticipated poor soil conditions. To make a submissible case for its breach of contract claim, Sherry was required to present evidence that (1) there was a contract between Sherry and American Family, which included certain rights and obligations between the parties, (2) American Family breached its obligation under the contract, and (3) American Family's breach damaged Sherry. *Teets v. Am. Family Mut. Ins. Co.*, 272 S.W.3d 455, 461 (Mo. App. 2008).

In its petition, Sherry also raised a claim of vexatious refusal to pay against American Family. To establish its submissible case for vexatious refusal to pay, Sherry had to establish that (1) Sherry had an insurance policy with American Family, (2) American Family refused to pay a claim submitted by Sherry under the subject insurance policy, and (3) American Family's refusal was without reasonable cause or excuse. *Hensley v. Shelter Mut. Ins. Co.*, 210 S.W.3d

455, 464 (Mo. App. 2007). Sherry's vexatious refusal to pay claim was dependent upon Sherry proving that American Family breached the insurance contract. *See Bickerton, Inc. v. Am. States Ins. Co.*, 898 S.W.2d 595, 602 (Mo. App. 1995). In this point, American Family claims, among other things, that Sherry failed to prove that American Family breached its obligation under the insurance policy because it failed to present evidence that the house's property damage occurred during the policy period.

American Family's insurance policy states that:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. . . .
>
> . . . .
>
> b. This insurance applies to 'bodily injury' and 'property damage' only if:
>
> (1) This 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'; and
>
> (2) The 'bodily injury' or 'property damage' ***occurs during the policy period***.

(Emphasis added.)

Sherry's insurance policy's declaration page states that the policy period began on December 5, 2002. At trial, the parties disputed the end date of the policy. American Family contended that Sherry canceled the policy in September 2003, while Sherry maintained that it did not cancel the policy and that the policy ended on December 5, 2003, which is the end date on the policy's declaration page. Since we are required to view the evidence in a light most favorable to the judgment, *Townsend*, 234 S.W.3d at 464, we must assume that the policy ended on December 5, 2003. Thus, to carry its burden at trial, Sherry was obligated to present evidence that the property damage occurred between December 5, 2002, and December 5, 2003.

At trial, Sherry's theory was that unanticipated and repeated exposure to poor soil conditions under the house caused the house to settle out of level, which caused property damage to the house's foundation. In that regard, Sherry contends on appeal that it carried its burden at trial to prove that the property damage occurred during the policy period because it presented evidence that the unanticipated poor soil conditions existed when Sherry built the house between December 5, 2002, and December 5, 2003. Sherry is correct that it presented evidence that the soil conditions existed when the house was built, which was between December 5, 2002, and December 5, 2003. In making this argument, however, Sherry misunderstands the phrase "occurs during the policy period." The phrase "occurs during the policy period" is unambiguous and refers to the time at which the ***property damage occurred***:

> 'It is well settled that the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the alleged wrongful act was committed, but is the time ***when the complaining party was actually damaged***.'

Shaver v. Ins. Co. of N.A.M., 817 S.W.2d 654, 657 (Mo. App. S.D. 1991) (citation omitted) (holding that the plaintiff's injuries did not occur within the policy period even though contractor had an insurance policy when he committed the wrongful act, because the plaintiff's injuries occurred after the policy ended); *see also U.S. Fid. & Guar. Co. v. Houf*, 695 S.W.2d 924, 928 (Mo. App. 1985) (holding that "[t]he issue of liability on a policy insuring against loss or damage is determined by the time when the loss occurs, not by the time of the negligent act.") The *Shaver* court relied upon the identical analysis of our court in *Kirchner v. Hartford Accident & Insurance Indemnity Co.*, 440 S.W.2d 751, 756 (Mo. App. W.D. 1969). 817 S.W.2d at 657. And, the *Shaver* court references no less than eight other cases to support Missouri's evidentiary requirement that coverage is triggered under the "injury in fact theory," that is, coverage is triggered when real personal injury or actual property damage first occurs. *Id.* Under Missouri law, therefore, for an event to be a covered occurrence, the time of the first actual property

damage must be within the effective dates of the insurance policy. *Amer. Fam. Mut. Ins. Co. v. McMullin*, 869 S.W.2d 862, 864 (Mo. App. 1994).

Thus, the fact that Sherry's act of building the house on unanticipated poor soil conditions occurred before the policy ended on December 5, 2003, is irrelevant. To make a submissible case at trial, Sherry was required to present evidence that the unanticipated soil conditions caused property damage ***and the actual property damage occurred during the policy period***. To the contrary, Sherry presented no evidence from which the jury could have concluded that the house's property damage occurred during the policy period.

The evidence at trial establishes that both the future owners of the house and Sherry's employees inspected the house before the owners purchased it on August 15, 2003. Darrin Sherry, the president and sole shareholder of Sherry, testified that there were no structural problems with the house when he inspected it. The only reasonable inference that can be drawn from this evidence is that the property damage to the house had not occurred by August 15, 2003.

The only other evidence that Sherry presented at trial regarding the timing of the property damage was testimony by Darrin Sherry that he did not receive any communication from the homeowners between August 2003 and April 2004. Sherry testified that the owners of the house notified him in April 2004 that there were some cracks in the foundation and sheetrock of the house. He also testified that, after employees of Sherry cosmetically repaired those cracks, he did not hear from the homeowners again until July 12, 2004, when he received a letter from them in which they informed him that there was substantial property damage to the foundation. The evidence, therefore, establishes that the property damage to the house occurred sometime between August 15, 2003, and April 2004.

Sherry, however, never presented any evidence that the completed home's exposure to the unanticipated soil conditions actually caused physical property damage to the home ***before*** December 5, 2003. The jury, therefore, had no evidence from which it could conclude that the damage occurred ***before*** December 5, 2003. Instead, the jury could only theorize that the property damage occurred before December 5, 2003, and not between December 6, 2003, and April 2004. That is the definition of speculation. *See LeGrand v. U-Drive-It Co.*, 247 S.W.2d 706, 712-13 (Mo. 1952) (speculation "is the act of theorizing 'about a matter in which evidence is not sufficient for certain knowledge.'") Of course, speculation cannot support a jury verdict. *Townsend*, 234 S.W.3d at 464. Sherry, therefore, failed to carry its burden to present evidence that its insurance contract with American Family covered the house's property damage. The trial court should have entered a directed verdict for American Family on Sherry's breach of contract and vexatious refusal to pay claim.

At oral argument, Sherry's attorney conceded that Sherry failed to present evidence at trial that the house's actual physical property damage occurred between December 5, 2002, and December 5, 2003. He maintained, however, that the law required Sherry to prove only that the occurrence of building the house on poor soil conditions occurred during the policy period. In other words, Sherry's attorney argues that Missouri recognizes damage to occur upon the exposure of the injury-producing condition. As we point out above, that is not the law of the state of Missouri. Therefore, we reverse the trial court's judgment and remand with instructions for the trial court to enter judgment for American Family.

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MARK D. PFEIFFER, JUDGE

Victor C. Howard, Presiding Judge,
and Joseph M. Ellis, Judge, concur.